

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-002

**TO:** Mayor John Engen, City Council, Bruce Bender, Gail Verlanic, Brentt Ramharter, Department Heads

**CC:** Legal Department Staff

**FROM:** Jim Nugent

**DATE:** March 4, 2013

**RE:** City residency requirements for City Employees.

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### FACTS:

City Council Members are currently discussing city residency requirements for City Employees. The discussion is generated by the upcoming selection of a Director for the new City Development Services Department.

### ISSUE(S):

May a city establish city residency requirements for City Employees?

### CONCLUSION(S):

Montana State Law currently has city residency requirements for appointed Municipal Officers unless non city residency has been approved by the City Council. It is legally possible for a city to establish a city residency requirement for City Employees if the city shows a rational relationship to a legitimate governmental purpose.

### LEGAL DISCUSSION:

Two separate provisions of Montana State Law currently require appointed Municipal Officers to be city residents. See Sections 2-16-501 and 7-4-4111, MCA. One section allows the city governing body, the City Council to approve an appointed Municipal Officer living outside the City limits. See subsection 7-4-4111(7) MCA.

Section 2-16-501 MCA is a general Montana State law pertaining to Public Officers generally including appointed City Officers. Section 2-16-501 MCA provides:

**2-16-501. Vacancies created.** An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent suffers from a mental disorder and is in need of commitment;
- (3) resignation of the incumbent becoming effective;
- (4) removal of the incumbent from office;
- (5) the incumbent's ceasing to be a resident of the state or, if the office is local, of the district, city, county, town, or township for which the incumbent was chosen or appointed or within which the duties of the incumbent's office are required to be discharged;
- (6) except as provided in 10-1-1008, absence of the incumbent from the state, without the permission of the legislature, beyond the period allowed by law;
- (7) the incumbent's ceasing to discharge the duty of the incumbent's office for the period of 3 consecutive months, except when prevented by sickness, when absent from the state by permission of the legislature, or as provided in 10-1-1008;
- (8) conviction of the incumbent of a felony or of an offense involving moral turpitude or a violation of the incumbent's official duties;
- (9) the incumbent's refusal or neglect to file the incumbent's official oath or bond within the time prescribed;
- (10) the decision of a competent tribunal declaring void the incumbent's election or appointment. (emphasis added)

Subsection 2-16-501(5) MCA establishes a city residency requirement for appointed City Officers; otherwise their appointed position becomes vacant. Section 7-4-4111 MCA of Montana Municipal Government law establishes an identical residency requirement for appointed Municipal Officers; but allows the City Council as governing body, to approve allowing an appointed Municipal Officer to reside outside the city limits.

Section 7-4-4101 MCA generally identifies Municipal Officers of a First Class City, a city with a population in excess of 10,000 people. Section 7-4-4101 MCA provides:

**7-4-4101. Officers of city of first class.** (1) The officers of a city of the first class consist of:

- (a) one mayor;
  - (b) two city council members from each ward; and
  - (c) one city judge.
- (2) The officers listed in subsection (1) must be elected by the qualified electors of the city, as provided in this part.
- (3) There may also be appointed by the mayor, with the advice and consent of the council:
- (a) one city attorney;
  - (b) one city clerk;
  - (c) one city treasurer or finance officer or one city clerk-treasurer;
  - (d) one chief of police;
  - (e) one assessor;
  - (f) one street commissioner;

- (g) one city jailer;
- (h) one city surveyor; and
- (i) any other officers necessary to carry out the provisions of this title.
- (4) The city council may by ordinance prescribe the duties of all city officers and fix their compensation.

Subsection 7-4-4101(3)(i) MCA is quite broad in that it provides that a Municipal Officer may be any officer necessary to carry out the provisions of Title 7. Title 7 is entitled “Local Government.”

Section 7-4-4111 MCA provides that the Officer of an appointed municipal office is vacant if the Municipal Officer ceases to be a resident of the city, unless the City Council as governing body has approved the appointed Municipal Officer residing outside the city limits.

Section 7-4-4111 MCA entitled “Determination of vacancy in Municipal Office” provides:

**7-4-4111. Determination of vacancy in municipal office.** An office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:

- (1) the death of the incumbent;
- (2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent is mentally ill;
- (3) the incumbent's resignation;
- (4) the incumbent's removal from office;
- (5) the incumbent's absence from the city or town continuously for 10 days without the consent of the council;
- (6) the incumbent's open neglect or refusal to discharge duties;
- (7) the incumbent's ceasing to be a resident of the city or town or, in the case of a city council member, ceasing to be a resident of the city council member's ward. This subsection does not apply to an appointed municipal officer who resides outside the city or town limits with the approval of the city or town governing body and within a distance of the city or town approved by the governing body.
- (8) the incumbent's ceasing to discharge the duty of office for a period of 3 consecutive months, except when prevented by illness or when absent from the city or town by permission of the governing body;
- (9) the incumbent's conviction of a felony or of any offense involving moral turpitude or a violation of official duties;
- (10) the incumbent's refusal or neglect to file an official bond within the time prescribed;
- (11) the decision of a competent tribunal declaring void the incumbent's election or appointment. (emphasis added)

As an example of governing body, city council, approval of appointed Officers being approved to reside outside the city limits, the Missoula City Council has enacted Title 2, Chapter 2.80 Missoula Municipal Code (MMC) entitled “Residency Requirements for Emergency Public Safety Employees”. Section 2.80.030 MMC approves peace officers and firefighters residing

outside the city limits in an “area located within a thirty minute average and a reasonable response time from the city limits”. Sections 2.80.030 and 2.80.040 MMC provide as follows:

**2.80.030 Continuous residency requirement.** After the effective date of this Ordinance, every individual employed by the city as either a peace officer or a firefighter shall be required continually from the date of initial employment to be a resident of the city or a resident of an area located within a thirty minute average and a reasonable response time from the city limits. Further, every individual employed by the city as either a peace officer or a firefighter shall be required to maintain his/her residence within the geographical areas herein described throughout his/her period of employment as a city peace officer or city firefighter.

The term "residence" shall mean the employee's permanent domicile and legal residence which shall be the permanent physical abode, house or other dwelling place at which the employee resides and to which the employee goes and remains when not called elsewhere for labor or other special or temporary purpose and to which the employee returns in times of repose.

**2.80.040 Exception.** Any individual currently employed by the city as a full-time peace officer or full-time firefighter who does not currently reside within the geographical limits described in this chapter, shall be allowed to maintain his present residence. In the event that he change his present residence, he must immediately move within the geographical limits described in this chapter. Job-related calls made to grandfathered residences outside the local directory will be paid for by the resident employee.

McQuillin, Municipal Corporations, Volume 2, 3<sup>rd</sup> Edition Revised, sets forth a lengthy discussion concerning Municipal Officer and employee City residency requirements in Section 12.59.10, Pages 335-343 stating in part:

**§ 12.59.10 – Officers and employees distinguished.**

A distinction is to be observed between officers proper and mere employees in relation to residency requirements. In the case of employees, while it is sometimes required that they be residents of the city at the time of their appointment, this is not always so, especially where they possess expert qualifications of which the city wishes to avail itself. But even where residence in the city is not required as a qualification, residence in the county or state is sometimes required. It is frequently provided that nonresidents must establish their residence in the city during their period of employment, usually under penalty of forfeiting their position if they fail to do so. In speaking of the necessity of residence on the part of employees, it is frequently this latter type of residence that is referred to, rather than the fact of residence at the time of appointment. However, a requirement that all classified employees of a city, including school teachers, be or become, within a specified time of their employment, residents within the boundaries of the city unless granted a special permit for certain specified reasons, would be invalid as placing a restriction on a fundamental right of its employees to live where they wish,

unless the requirement that the employees live within the city serves a public interest which is important enough to justify the restriction on private right.

When municipal residency requirements are challenged on equal protection grounds the requirement need only be shown to have a rational relationship to a legitimate government purpose in order to pass constitutional muster.

Direct public employment is not a fundamental right protected by the privileges and immunities clause. Thus, a residency requirement that all nonexempt permanent employees live within the city limits is constitutional because those paid with tax dollars should support the tax base and should be part of the community they serve in order to understand and identify with its problems. Such a residency rule does not become irrational because some employees are exempt. Legislation may address one aspect of a situation at a time as long as the classifications are not based on individual discrimination. Accordingly, police and firefighters may be exempt due to provisions in their collective bargaining agreements and the grandfathering of other employees based on the length of their employment as a constitutional means to gradually achieve a workforce that resides in the city. ....

A residency requirement for regular employees may run afoul of Title VII protections where the plaintiffs can show disparate impact and the municipality cannot show a business justification for the requirement. The business justification standard is tougher than mere rationality, and reliance on statements of purpose found in legislation and case law is not enough. The municipality must present evidence that the residency requirement serves some significant business purpose. Moreover, even if the municipality establishes that it has a significant business purpose in the requirement, a plaintiff can still prevail if the plaintiff can show alternative means of achieving that purpose.

Under an ordinance providing for a waiver of the residency requirement and requiring the civil service commission to base its determination as to waiving the requirement on the nature of the work, location of the work and all other pertinent facts concerning employment, personal hardship factors must be considered even though the best interests of the city are paramount. However, an employee has no due process right accruing from the grant of previous exemptions and where shown to be in violation of a residency requirement will be considered as an employee at will subject to dismissal.

An ordinance requiring all officers and employees of city to be bona fide residents, but which exempts police and firefighters from residency ordinance and which permits the director of any department to permit an employee to remain in the employ of the city without complying with the residency provisions has been found, as applied, not to deny equal protection to those municipal employees required to reside within the city. Also held valid has been an ordinance requiring certain classes of to reside within a “residency area” which is peripheral to the municipal boundaries insofar at places from which they could effectively be called to duty when needed. On the other hand, violation of a requirement that police officers reside within the municipality has been held

insufficient as cause for termination where no showing is made that the violation has caused the police department to be less efficient or has impaired its protection capabilities....

In some municipalities it is required that an officer or employee continue to maintain his or her residence within the municipality after his or her appointment, and such a requirement is not unfair, unreasonable, and arbitrary, nor does it unconstitutionally infringe upon the employee's right to travel.

The Law of Local Government Operations by Charles S. Ryhne in section 13.4, pages 222 to 223 sets forth a shorter discussion of city officer or employee city residency requirements stating in pertinent part:

**§13.4 Citizenship; Residence.** .... Municipal officers and employees have been subject to two types of residency requirements – durational and continuous. A durational residency requirement mandates that one must be a resident of the municipality for a prescribed period of time before assuming office or employment; a continuous residency requirement mandates that one must reside in the municipality during the term of office or employment.

Durational residency requirements have been held to infringe on three different fundamental rights guaranteed by the federal constitution. the right to interstate travel, the right to vote, and the right to freedom of association. Therefore, the compelling interest test has generally been used to sustain constitutional attacks against durational residency requirements under the equal protection clause of the Fourteenth Amendment. .... A continuous residency requirement does not infringe on any fundamental rights protected by the federal constitution; therefore, such a requirement will be upheld if it is rationally related to the legitimate governmental interest. Continuous residency requirements have been upheld as rationally related to a municipality's legitimate interest in reducing the unemployment rate of inner-city citizens, enhancing the general economic benefits from local expenditure of salaries and payment of local taxes, diminishing absenteeism and tardiness and promoting a feeling of greater personal responsibility for the welfare of the municipality.

## **CONCLUSION(S):**

Montana State Law currently has city residency requirements for appointed Municipal Officers unless non city residency has been approved by the City Council. It is legally possible for a city to establish a city residency requirement for City Employees if the city shows a rational relationship to a legitimate governmental purpose.

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